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Private Property Rights and Telecommunications Policy: Hearing Before the H. Comm. on the Judiciary, 106th Cong., Mar. 21, 2000 (Statement of Viet D. Dinh, Prof. of Law, Geo. U. L. Center)

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PRIVATE PROPERTY RIGHTS AND TELECOMMUNICATIONS POLICY

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

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CONTENTS

HEARING DATE

OPENING STATEMENT

WITNESSES

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

uniquely valuable telecommunications assets, the prohibitions also amount to a regulatory taking.

But whether viewed as a *Loretto* taking or a regulatory taking, the regulations proposed by the Commission in the NPRM would trigger a very large financial liability for the Government to pay just compensation to building owners. This liability was certainly not foreseen or intended by Congress when it passed the Communications Act, nor was there any indication at all in the act that Congress meant for the Commission to have the authority to issue regulations restricting the established rights of real property owners.

For these reasons, the Real Access Alliance has submitted comments to the Commission stating that the proposals discussed in its NPRM cause a taking of property under the Fifth Amendment to the Constitution.

Again, thank you for this opportunity to address the Subcommittee on this important subject.

Professor Dinh.

STATEMENT OF VIET D. DINH, ASSOCIATE PROFESSOR OF LAW, GEORGETOWN UNIVERSITY SCHOOL OF LAW

Mr. DINH. Thank you, Mr. Chairman. Congressman Conyers, members of the committee, thank you very much for the opportunity to be here, and to Mr. Rosenthal for providing a very thoughtful analysis and framing the issues. I appear today on behalf of the Smart Building Policy Project, although I should note that I appear as an analyst and not as an advocate. So please don't hold what I say against them. These are my positions as to how I see the constitutional issues in this case and not necessarily the position that their counsel, or the members of the Project would necessarily take.

It seems to me that the issues posed by this hearing and by the FCC's notice of proposed rulemaking are twofold. One, whether there would be an unconstitutional taking of property and, two, whether the FCC has authority to effect such a rule. And I start with the first by noting that Chairman Canady and Mr. Rosenthal are perfectly correct and cogent in their analysis of the *Loretto* decision, and with that I have absolutely no quibble with the analysis set forth there, nor with the court's decision in *Loretto*. I think it is correct.

By the same token, I believe that the 11th Circuit's decision on the takings issues in 47 USC section 224, the mandatory access provisions with respect to the utilities, is also correct. That works as a taking because those statutory provisions require the utilities to open up their lines, open up their utilities, their rights of way and their premises which they own or control to uninvited telecommunications providers.

What the FCC proposes, as I understand in this case, is not such a "mandatory access requirement." It is not forcing building owners to open up their doors to uninvited telecommunications providers. Rather, it is simply a requirement that should building owners open up their door to any telecommunications provider, then they would have to open up their door to other telecommunications providers on nondiscriminatory terms.

So in that sense, I think that this case poses a potential conflict, if you will, that requires careful line drawing between two lines of Supreme Court jurisprudence, the *Loretto* line of cases, which I think is jurisprudentially valid and very sensible, and also another line of cases, cases like *Heart of Atlanta Motel*, which says that it

is not a taking where you open up your premises for public accommodation to require nondiscrimination on bases of race, religion and gender and the like, as announced by Congress in the Civil Rights Act of 1964.

Analogously, if you open up a mall to public access, as *Pruneyard Shopping Center* v. *Robbins*, the court says you cannot discriminate against certain speech because you happen to disagree with that speech. If you open it up, you have to open it up equally, and that is simply a condition of the access provisions.

In that sense I think that the case of *Yee* v. *Escondido* is quite apt, and that case specifically addressed the the discussion in footnote 17 of *Loretto*, which Mr. Rosenthal referred to regarding the conditioning of access on a nonpayment of rental for the cable television line that case. In *Yee* v. *Escondido*, the court made very clear that the *Loretto* does not seek to address cases like *Heart of Atlanta Motel*. Indeed, it cited it, or cases like the cases that uphold rent control laws or fire codes, which, in some sense, require a physical intrusion. By requiring a fire detector to be on a property, that is a physical occupation of space, yet those cases are looked under a regulatory taking point of view as the court did in *Yee* v. *Escondido* rather than on a physical taking line of case as in *Loretto*. And the court in *Yee* specifically distinguished those cases.

Indeed, *Yee* itself concerned a statutory and ordinance scheme whereby the landowner in that case, an owner of mobile home parks, did not have an opportunity to object to the tenants in the mobile home park, and so it specifically addresses the points that are relevant to this case.

That said, I think it is a very hard constitutional question, and the task of line drawing rests with the Supreme Court. So I do not venture to propose a conclusion here. What I do note, however, is that even if there is a physical taking or a taking of any type, there is adequate provision in the FCC's contemplation for just compensation. I suspect that that would be where most of your questions would be: how the FCC would be able to effect such a just compensation under a nondiscriminatory regime. I am sure that all three of us would be happy to answer questions in that regard, and I am sure the economists in the next panel would be happy to provide the details in that regard.

Mr. CANADY. Thank you, Professor Dinh.

[The prepared statement of Mr. Dinh follows:]

PREPARED STATEMENT OF VIET D. DINH, ASSOCIATE PROFESSOR OF LAW, GEORGETOWN UNIVERSITY SCHOOL OF LAW

Mr. Chairman and Members of the Subcommittee,

Thank you very much for this opportunity to comment on the constitutional issues raised by the pending FCC Notice of Proposed Rulemaking on nondiscriminatory telecommunications access to multi-tenant environments. I note that there are several bills pending in Congress that seek to ensure the same result as the proposals under consideration by the FCC.

I am an Associate Professor of Law at the Georgetown University Law Center where I specialize in constitutional law, among other things. Prior to joining the faculty, I was a law clerk to Justice Sandra Day O'Connor on the U.S. Supreme Court, and to Judge Laurence Silberman on the Court of Appeals for the D. C. Circuit. I am currently writing JUDICIAL AUTHORITY AND SEPARATION OF POWERS; A REFERENCE GUIDE TO THE U.S. CONSTITUTION, to by published by Greenwood Press.

Although I appear on behalf of the Smart Building Policy Project,[1] I am here as an analyst and not an advocate. My analysis, therefore, is not necessarily the position of the Project or any of its members; rather, it is simply how I see the constitutional issues in this matter.

The takings issue posed by this hearing's inquiry concerning the FCC's Notice consists of two principal questions: (1) whether a nondiscriminatory access requirement constitutes a taking of private property for public use without just compensation in violation of the Fifth Amendment; and (2) even if such a requirement is constitutionally sound, whether the FCC has authority to promulgate the proposed rules. I will address each question in turn. For the reasons detailed below, I conclude that the nondiscriminatory access proposals are constitutionally sound and that the FCC has the statutory authority to promulgate them.

I. The Constitutionality of a Nondiscriminatory Access Requirement

The Fifth Amendment to the Constitution guarantees that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. The proper analysis of the proposed FCC action, accordingly, has two component steps: (A) whether a nondiscriminatory access requirement constitutes a taking of private property; and (B) if it is a taking of property, whether the property owners would not receive just compensation. Only if both inquiries yield affirmative answers would there be a violation of the Fifth Amendment.

A. Taking.

The Supreme Court has established two tests to determine whether a government action constitutes a taking. A permanent physical occupation of private property is a taking per se, *see, e.g., Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); the only question is whether there would be adequate compensation. By contrast, other government regulations not involving a permanent physical occupation, such as conditions on the use of private property, are takings only if they fail the multifactor balancing test applicable to regulatory takings. *See, e.g., Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124–25 (1978).

Whether a nondiscriminatory access requirement constitutes a permanent physical occupation that is a per se taking under *Loretto* is a close question, one that the Supreme Court has not directly addressed. Nor has my research revealed any holding or discussion in lower court opinions directly on point.

Unlike the proposed nondiscriminatory access requirement, if the FCC were to require building owners to open up their property for any and all telecommunications companies to install their equipment, such a requirement would constitute a per se taking. That much is evident from the facts of *Loretto* itself, and it matters not that the intrusion is minimal—that the ceded area is no "bigger than a breadbox." *Loretto*, 458 U.S. at 438 n.16. In that regard, I think the Court of Appeals for the Eleventh Circuit correctly held in *Gulf Power Co.* v. *United States*, 187 F.3d 1324, 1328 (11th Cir. 1999), that the mandatory access provision of 47 U.S.C. § 224 is a per se taking. (The court further held that the taking is constitutional because there are adequate procedures for just compensation, a subject to which I return below in Part B.)

A nondiscriminatory access requirement of the type proposed by the FCC, however, is substantively different. Instead of mandating that a property owner open his property to outsiders, a nondiscrimination provision simply requires that, should the owner open his property to any outsider, he must also entertain others. The proposal, therefore, is analogous to the nondiscrimination requirement of Title VII of the Civil Rights Act of 1964, which the Supreme Court held not to constitute a taking of property in *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 261 (1964). *Heart of Atlanta Motel*, of course, is not directly apposite because Title VII requires general access to places of public accommodation only, and the FCC proposal would provide limited access to property retained for private use. This distinction, however, turns on the public purpose of the government action. With respect to whether the action constitutes a taking, however, it seems to me that the two nondiscriminatory access requirements are quite analogous.

So viewed, nondiscrimination is but a governmental condition on a property owner's decision to provide some carriers access to his property. Even where such a condition would work a permanent physical intrusion, the condition would constitute

[1] The members of the growing Smart Building Policy Project currently include the American Electronics Association, the Association for Local Telecommunications Services, AT&T Corp., the Competition Policy Institute, the Information Technology Association of America, the International Communications Association, MCI WorldCom, NEXTLINK Communications, Teligent, Inc., Winstar Communications, Inc., and the Wireless Communications Association.

a taking only if there is not a sufficient nexus to the government's authority to regulate the underlying action. Thus, in *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), the Commission conditioned the grant of a building permit upon provision of a permanent easement to provide access to public beaches. The Court held that a permanent access easement is a permanent physical occupation under *Lorett*, *see id.* at 831–32; however, that holding did not end the analysis. The easement requirement constituted a taking only because, as a condition, it did not bear a sufficient nexus to the government's reason for regulating the construction of the residential home. *See id.* at 836–37. The Court later explained that a sufficient nexus exists if there is a "rough proportionality" between the "nature and extent" of the condition and the "impact" of the underlying activity. *Dolan* v. *City of Tigard*, 512 U.S. 374, 391 (1994). Following these guidelines, numerous courts have upheld permanent access easements as reasonable conditions. *See, e.g., Curtis* v. *Town of South Thomaston*, 708 A.2d 657, 659–60 (Me. 1998) (upholding a fire safety regulation that conditioned approval of a subdivision plan upon the developer building a fire pond and granting the town an easement to maintain and use the pond); *Grogan* v. *Zoning Board of Town of East Hampton*, 633 N.Y.S.2d 809, 810 (App. Div. 1995) (upholding zoning board's decision to condition grant of permit to build addition onto house upon owner's granting scenic and conservation easement), *appeal dismissed*, 670 N.E.2d 228 (N.Y. 1996); *Sparks* v. *Douglas County*, 904 P.2d 738, 745–46 (Wash. 1995) (en banc) (upholding planning commission's decision to condition approval of short plat applications upon dedication of rights of way for road improvement). Just so with the FCC's proposed nondiscriminatory access requirement. Such a nondiscrimination condition bears a sufficient nexus to the FCC's authority to regulate property owners' provision of access to telecommunication carriers; the nondiscrimination condition is proportional to the impact of the landowners' actions, that is perpetuating local telecom monopolies through discriminatory access.

Another analogous line of cases is the rule in antitrust law that a dominant market participant must provide competitors access to essential facilities it owns. *See, e.g., MCI* v. *AT&T*, 708 F.2d 1081, 1132–34 (7th Cir. 1983). Despite calls from commentators,[2] my research has uncovered no case holding that such a requirement constitutes a per se taking under *Loretto*. In *Consolidated Gas Co. of Florida* v. *City Gas Co. of Florida*, 912 F.2d 1262 (11th Cir. 1990) (per curiam), *vacated as moot*, 499 U.S. 915 (1991), the Eleventh Circuit, sitting en banc, affirmed a district court decision that invoked the essential facilities rationale and ordered the respondent to sell wholesale gas to the petitioner at reasonable prices—over the objections of two dissenting judges that such relief raised Fifth Amendment concerns, *see id.* at 1312–20, and specifically that it would work a per se taking under *Loretto*. *See id.* at 1315 n.52.

In sum, whether a nondiscriminatory access requirement is a per se taking is an open question. Any unqualified answer in the affirmative is in error because it gives conclusive weight to *Loretto* and ignores the competing principles set forth in cases like *Heart of Atlanta Motel and Nollan*. I do not venture a conclusion here because the question requires resolving the conflict between two competing lines of cases, both of which are jurisprudentially sensible and legally valid'a task of line drawing that ultimately rests with the Supreme Court. In any event, such a speculation is not necessary to my ultimate conclusion that the FCC proposals are constitutionally sound.

If a nondiscrimination access requirement does not work a per se taking, the proposed FCC action is likely to be upheld as a permissible regulation of the use of private property under the "ad hoc, factual inquiries" into the factors summarized in *Penn Central*: the character of the government action, the economic impact of that action, and its interference, if any, with investment-backed expectations. *See* 438 U.S. at 124. First, the proposed regulations are designed to further the public interest, as defined by Congress, "to foster competition in local telecommunication markets." Notice of Proposed Rulemaking, ¶1 (released July 7, 1999); *see* 47 U.S.C. §251. The Court "has often upheld substantial regulation of an owners' use of his own property where deemed necessary to promote the public interest." *Loretto*, 458 U.S. at 426. Second, the economic impact of the proposed regulations is minimal, at most. Property owners will be directly compensated for the use of property they own and control and indirectly compensated, through rents, for the use of property they own but is controlled by a communications carrier. Third, any expectations

[2] *See* Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 STAN. L. REV. 1187, 122740 (1999) (arguing that if a court were to treat Microsoft's operating system software as an essential facility and were to require Microsoft to include Netscape's internet browser in that operating system, the government would have taken Microsoft's property, under the per se rule in *Loretto*, and would be required to pay just compensation).

backed by the owners' investments are in the use of their property as real estate. These expectations are minimal, if not nil, with respect to ducts and roof space dedicated to utility equipment. Any fortuitous opportunity they now have to participate in the telecommunications business (either as competitors or as lessors of facilities) results from the deregulatory program that the FCC has pursued following a congressional directive. In any event, any investment-backed expectations the owners may have in telecommunications are limited because the owners are operating in a field (telecommunications and/or transacting with communications carriers) that is heavily regulated by the federal government. Such regulations are constantly in flux, rendering unreasonable any assumption or expectation that a nondiscriminatory access requirement or other regulation on the use of their property would not be imposed in the future.

B. Compensation.

Even if, *arguendo*, the proposed FCC regulations constitute a taking, the analysis does not end. "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194 (1985). "If the government has provided an adequate process for obtaining compensation, and if resort to that process yields just compensation, then the property owner has no claims against the government for a taking." *Id.* at 195. According to the Notice of Proposed Rulemaking, the FCC contemplates two primary avenues for effecting nondiscriminatory access to multi-tenant environments for communications carriers. First, the FCC may require incumbent local exchange carriers to provide competitors with access, at just, reasonable, and nondiscriminatory rates, to the conduits and rights of way that they control (through leaseholds or other access arrangements) in the buildings. *See* Notice of Proposed Rulemaking, ¶¶ 36, 48. Second, the FCC may require building owners to provide competitive local exchange carriers equal access, at nondiscriminatory rates, to their property for the purpose of installing transmission equipment to service tenants. *See id.* ¶ 60. Under either avenue, the FCC may ensure "that a reasonable, certain, and adequate provision for obtaining compensation exist[s] at the time of the taking." *Wiilliamson County*, 473 U.S. at 194.

First, should the FCC require incumbent carriers to provide access to the conduits and rights of way that they control, 47 U.S.C. § 224(e) permits the carriers to assess charges for such access. The statute sets forth a clear formula for the carrier to recover costs of providing access, through an allocation of the costs of providing both usable and unusable space in the conduits and rights of way. The provision further requires the FCC to promulgate regulations to govern the access charges should "the parties fail to resolve a dispute over such charges." Id. § 224(e)(1). "Such regulations shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments." *Id.*

This statutory procedure guarantees the incumbent carrier ample opportunities to obtain just compensation for providing access. In the first instance, it may levy compensatory charges according to the prescribed cost allocation formula. Should there be a dispute as to such charges, it may negotiate at arms length with the competitive carrier to set appropriate rates. Finally, should the dispute not be resolved, the FCC, after appropriate complaints and proceedings, may determine rates that are "just, reasonable, and nondiscriminatory" pursuant to duly promulgated regulations. On its face, therefore, the statute satisfies the just compensation requirement of the Fifth Amendment. I suppose that there is a possibility that a particular agency determination of a "just, reasonable, and nondiscriminatory" rate would not provide, in the final analysis, "just compensation" under the Fifth Amendment. Such risk, however, inheres in every governmental action, and the remote possibility does not render the FCC proposal facially unconstitutional. *See Gulf Power*, 187 F.3d at 133738. In any event, the FCC's rate determination, like other agency actions, is subject to judicial review; the incumbent carrier, therefore, is afforded full protection against the risk of such administrative error. *See id.* at 1338.

Second, with respect to access to areas owned and controlled solely by property owners, the FCC proposes that the owners be paid "nondiscriminatory" rates for such access. The Commission is currently seeking comments on how such rates should be determined, so the precise parameters of such compensation are not fixed. I note, however, that the Commission proposes that property owners be permitted "to obtain from a new entrant the same compensation it has voluntarily agreed to accept from an incumbent LEC." Notice of Proposed Rulemaking, ¶ 60. Such reliance on the arms-length bargain struck with incumbent carriers seems to me a reasonable approximation of the fair market value of access and thus would provide just compensation for any taking of property. To the extent that changed circumstances or different market conditions may render such original compensation an unreliable

indicator of fair value, the Commission has also sought comments on how to tailor any nondiscriminatory access requirement to ensure consumer choice "without infringing on the rights of property owners." *Id.* ¶ 55. Thus, at this point, there is little reason to suspect that the procedures for setting nondiscriminatory access charges would not ensure a fair, certain and adequate process for property owners to obtain just compensation for any taking of their property.

II. The Commission's Authority to Promulgate the Proposed Rules

The nondiscriminatory access proposals by the FCC also raise certain separation of powers considerations concerning the Commission's authority to promulgate the proposed regulations. For reasons outlined below, I conclude that the Commission would likely be found to have such authority.

As an initial matter, there is little question that, shorn of the Fifth Amendment implications of the proposed requirements, the Commission has authority to regulate access to multi-tenant environments for the provision of telecommunications services. With respect to facilities controlled by incumbent carriers, 47 U.S.C. § 224 explicitly authorizes the Commission to require that a utility provide access to any "duct, conduit, or right-of-way owned or controlled by it," *id.* § 224(f)(1), and the statute defines utility to include communications carriers. *See id.* § 24(a)(1). With respect to property owned and controlled by the building owners, 47 U.S.C. §§ 151, 152 grant the Commission authority to regulate the transmission of interstate wire or radio communication. The definition of wire communication includes "all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission" and thus contemplates property used for the purpose of providing interstate communication services. *Id.* § 153(52). And 47 U.S.C. §§ 151, 152 further grant the Commission authority to regulate persons engaged in interstate wire communication, as that term is defined above. Building owners, accordingly, are persons engaged in interstate wire communication by virtue of their control or denial of access to the facilities incidental to the transmission of such communication. Finally, the Commission has authority under 47 U.S.C. § 154(i) to "make such rules and regulations, . . . not inconsistent with this chapter, as may be necessary in the execution of its functions" and under 47 U.S.C. § 303(r) to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter." Although the authority under the provisions is frequently termed "ancillary jurisdiction" in the telecommunications parlance, it is more aptly analogized to a general necessary and proper authority to effectuate the purposes and provisions of the statute. *See* PETER HUBER, ET AL., FEDERAL TELECOMMUNICATIONS LAW § 3.3.1, at 221 (2d ed. 1999).

The analysis into agency authority, however, is further complicated by the presence of Fifth Amendment considerations as outlined above. In *Bell Atlantic Telephone Co.* v. *FCC*, 24 F.3d 1441 (D.C. Cir. 1994), the D.C. Circuit reviewed orders of the Commission that required carriers to set aside a portion of their central offices for use by their competitors—known as the physical co-location orders. The petitioners challenged the Commission's authority to promulgate the regulations. The court recognized that it would normally defer to the Commission's statutory interpretation under the principles announced in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), but held that it would not do so in this case because the Commission's interpretation raised substantial constitutional questions regarding executive encroachment on Congress' exclusive powers to appropriate funds. *See Bell Atlantic*, 24 F.3d at 1445. Specifically, the court found that the FCCs orders amounted to a forced access requirement, and thus in all cases "will necessarily constitute a taking" under *Loretto*. *See id.* at 1445–46 (quoting *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 n.5 (1985)). To avoid this perceived constitutional difficulty, the court held that the Commission's authority to order physical co-location must either be found in express statutory language or must be a necessary implication from that language, such that "the grant [of authority] itself would be defeated unless [takings] power were implied." *Id.* at 1446 (quoting *Western Union Tel. Co.* v. *Pennsylvania R.R.*, 120 F. 362, 373 (C.C.W.D.Pa. 1903), *aff'd*, 195 U.S. 540 (1904)) (alterations in original). Finding this "strict test of statutory authority made necessary by the constitutional implications of the Commission's action" not satisfied, the court held that the Commission lacked authority to issue the physical co-location orders. *Id.* at 1447.

Upon closer analysis, however, the holding of *Bell Atlantic* does not apply to the nondiscriminatory access requirements proposed by the FCC. First, the regulation of areas controlled by a communications carrier follow from the express authorization to order a physical taking found in 47 U.S.C. § 224. As to that portion of the

proposed rule, therefore, the "strict test" of *Bell Atlantic* is satisfied.[3] Second, the requirement of nondiscriminatory access to areas owned and controlled by landlords, unlike the forced access orders at issue in *Bell Atlantic*, will not "necessarily constitute a taking." As I concluded above, whether the requirement will be judged under the *Loretto* standard or the competing standards applied in *Heart of Atlanta Motel* or *Nollan* is a close question. In *Loretto* the Court rejected the suggestion that the installation of cable equipment was not a per se taking because the property owner retained the right to cease renting his property to tenants and thereby to avoid the requirement. It explained that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." Loretto, 458 U.S. at 439 n.17. However, the Commission is contemplating regulations that would ensure property owners receive just compensation for any physical occupation of their property. And the Commission has authority to require new entrants into a building to pay just compensation to property owners under 47 U.S.C. §§ 154(i), 303(r), as such regulations are "reasonably ancillary to the effective performance of the Commission's various responsibilities," *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). In particular, the statute requires the Commission to foster competition in local telecommunications markets. On *Bell Atlantic*'s reasoning, therefore, a reviewing court should grant *Chevron* deference to the Commission's interpretation of its authority under the statute.

As Professors Baumol and Merrill explained in assessing whether provisions of the Telecommunications Act of 1996 effect an unconstitutional taking: "[A]s long as the Act includes mechanisms which can provide just compensation for any taking claims found to have merit, these claims, too, should provide no basis to halt the implementation of the Act in the manner deemed most appropriate by regulators to achieve its purpose." William J. Baumol & Thomas W. Merrill, *Deregulatory Takings, Breach of the Regulatory Contract, and the Telecommunications Act of 1996*, 72 N.Y.U. L. Rev. 1037, 1056 (1997).

* * *

In the final analysis, I conclude that the nondiscriminatory access proposals are constitutionally sound and that the FCC has the statutory authority to promulgate them. Thank you.

Mr. CANADY. Professor Eagle.

STATEMENT OF STEVEN J. EAGLE, PROFESSOR OF LAW, GEORGE MASON UNIVERSITY SCHOOL OF LAW

Mr. EAGLE. Mr. Chairman, Mr. Conyers, I appreciate the opportunity to speak to the subcommittee today. My name is Steven Eagle. I am a professor of law at George Mason University, and I am here today in my capacity as a scholar whose interest is in the intersection of property and constitutional law.

I think that as Mr. Conyers had mentioned earlier, Congress certainly is well advised to try to facilitate ways to have universal access to all kinds of information and an expansion of our telecommunications system to do that. However, we have to do that, of course, within the context of fifth amendment protections for property rights. After all, the purpose of the fifth amendment is not to rule out government activities because they are impermissible but, to the contrary, to reconcile permissible and even laudable government activities with the requirements of the Constitution that the property rights of individuals be respected.

Mr. Chairman, in your opening statement, you quoted parts of Justice Marshall's *Loretto* opinion that I otherwise would have

[3] Because 47 U.S.C. § 224(f)(1) requires a carrier to provide access to ducts and conduits "owned or controlled" by it, Congress clearly contemplated that the FCC would regulate property that is merely controlled by a carrier and therefore owned by a third party. Thus, even if the proposed regulations based upon § 224 necessarily effect a taking without just compensation to property owners in every case, Congress in § 224 has expressly granted the FCC the power to effect such takings and has concomitantly authorized the expenditures needed to satisfy those owners' claims for just compensation.

quoted here. Certainly the *Loretto* case has to be the beginning of our inquiry. The FCC and other groups that wish to impose mandatory access have the obligation, I think, to distinguish why the *Loretto* case should not be govern in this situation.

Loretto, it is true, does not affect the economic regulation of owners of different aspects of a parcel, such as landlord and tenant, within the context of an ongoing relationship. That was recognized in the telecommunications field by the Supreme Court in *FCC* v. *Florida Power* in 1987, where the Court made it clear that the FCC did have the right to regulate a carrier's relationship with a cable company it had voluntarily allowed access to its lines. However, I think it is important to note that Courts of appeals have drawn the line at that. In subsequent cases where there has been a mandated access to utility company lines, the courts have said that this is an impermissible taking, or would be an impermissible taking, unless there were just compensation.

The two leading cases are the Court of Appeals for D.C. Circuit decision in *Bell Atlantic* v. *FCC*, which is the co-location case of 1994, and, most on point, *Gulf Power Company* v. *United States*, 1999. There, the 11th Circuit adjudicated the extension of the Pole Attachments Act to provide for mandatory access to equipment. The Eleventh Circuit said that it was the voluntary nature of the access in *Florida Power* was determinative and if there was not a voluntary relationship, the takings clause is violated.

I think that cases like *Heart of Atlanta* and *Yee*, with respect, are not quite on point. For instance, in the *Heart of Atlanta* case, the government was vindicating a Civil Rights statute, and more important for our immediate purpose, it was vindicating a person's right to have a license in a hotel room for a one night period or a few nights. This is not the kind of permanent physical occupation that *Loretto* contemplated. Likewise, *Yee* v. *City of Escondido*, a case reviewed by the Supreme Court only to resolve a conflict between State and Ninth Circuit jurisprudence having to do with mobile homes, is a rather anomalous case. The Court vindicated the right of a mobile homeowner to sell his unit to another and vindicated rent control principles generally. *Yee* ought not to be extended beyond that.

I want to emphasize two elements in Professor Dinh's written testimony. The first has to do with exclusivity. He asserts that the FCC could reasonably simply take the charges of an existing carrier as a baseline to determine reasonable charges for a new carrier. Well, you can't unscramble the omelet that easily. Presumably, an exclusive relationship allows all kinds of economic factors at work that piecemeal relationships don't. Pricing is a subject for the next panel, but I suggest that would be extremely difficult.

Second, Professor Dinh says there is little reason to suspect that procedures used by the FCC for just compensation would not be fair. With respect, I have testified before this subcommittee earlier, and many others have as well regarding the problem of providing adequate State procedures to deal with State condemnations or State regulatory takings prior to litigation in the Federal courts. I submit that a procedure where the FCC engages in determinations before Federal courts can hear a case will be, in effect, the creation of another *Williamson County* ripeness doctrine within the Federal